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85-1514

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

YOUNIS MANSI ESSA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN (P-24381)
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

39 P

QUESTION PRFSENTED

UNDER MICHIGAN V CLIFFORD IS AN ENTRY INTO A DWELLING TO INVESTIGATE THE CAUSE AND ORIGIN OF A FIRE, ACHIEVED WITHIN A REASONABLE TIME AFTER THE FLAMES HAVE BEEN EXTINGUISHED, CONSTITUTIONAL EVEN WITHOUT WARRANT WHERE THERE HAS BEEN NOTICE OF THE ENTRY GIVEN, AN ATTEMPT TO GIVE NOTICE, OR IT IS DEMONSTRATED THAT ANY ATTEMPT TO GIVE NOTICE WOULD HAVE BEEN FUTILE?

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TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and pray that a writ of certiorari issue to review the judgment

of the Court of Appeals of the State of Michigan entered in the above-entitled cause on October 8, 1985, leave to appeal denied by the Michigan Supreme Court February 26, 1986.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 146 Mich App 315 (1985) and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 8, 1985. The judgment of the Michigan Supreme

Court was entered on February 26, 1986. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged with arson of a dwelling, and the preliminary examination began on January 9, 1984

Witness Dennis Tolliver testified that he lived right next door to 8858 Rathbone, the house which had burned, and was the neighbor of the respondent. (T 4-5) At approximately 6:20 p.m., he observed respondent, his wife, and their children in their auto. Respondent left the auto and returned to the house, and then exited in the company of another individual whom Mr. Tolliver had seen previously with Mr. Essa. (T 5-6) Mrs. Essa and this man got into the car and drove off fast. (T 7) Within three minutes the windows of one side of the house

were blown out by flame. (T 7) He told the firefighters what he had seen. Mr. Tolliver also testified that while the fire investigators were in the house respondent drove up, sat in his auto for a few seconds, and then drove off. This occurred a second time, and on a third occasion after the investigators had left respondent and his wife got out of the car and looked in the house for a moment, and then left. (T 9-11)

Thomas Brown testified that he was a firefighter, and that firefighters arrived at the scene of the fire at 6:25 p.m. to fight the blaze. (T 31-32) While engaged in fighting the fire he noticed the odor of an accelerant of some sort, and found an

electric hot plate in the living room area plugged into an outlet. (T 32-33) He also talked to Mr. Tolliver. Suspecting that the fire may have been deliberately set, he called for a fire investigation team. (T 33)

Lieutenant William Peck was qualified as an expert in the determination of the case and origin of a fire and testified that he arrived at the scene at 8:30 p.m., or one hour and twenty minutes after the flames had been extinguished. (T 39-44) His purpose was to investigate the fire for cause and origin. (T 47)

After argument the examining magistrate held that because an hour and a half or so had passed between

the extinguishing of the flames and the investigative entry, Michigan v Tyler, was inapplicable and the entry unconstitutional because unwarranted. (T 58-65)

Testimony then continued as to a second entry made with consent. That entry was held unlawful also, but ultimately upheld by the Michigan Court of Appeals and is not involved in this petition. The case was dismissed by the magistrate after these rulings. (T 156-157) The People appealed, and the Recorder's Court for the City of Detroit affirmed the dismissal and orders of suppression. The Court of Appeals affirmed as to the initial entry, and reversed as to the consent entry. The Michigan Supreme Court denied leave to appeal on February 26, 1986.

REASONS FOR GRANTING THE WRIT

Petitioner submits that this case is governed by the most recent case in the area of fire investigations, Michigan v Clifford, ____US____; 104 S Ct 641 (1984). However, because Clifford resulted in a 4-1-4 opinion, with Justice Stevens concurring in the result, but agreeing in part with the dissent, clarification of the meaning of Clifford is crucial to the proper administration of justice (see dissenting opinion of Justice Rehnquist: "...we are told in the Court's opinion in this case that 'we granted certiorari to clarify doubt that appears to exist as to the

application of our decision in Tyler....But that same opinion demonstrates beyond peradventure that if that was our purpose, we have totally failed to accomplish it; today's opinion, far from clarifying the doubtful aspects of Tyler, sows confusion broadside" 104 S Ct at 653). See also the opinion of the Michigan Court of Appeals in this case, stating that

> Plaintiff would have us hold that the initial nonconsensual search without a warrant in the instant case was reasonable because five justices in Clifford, including Justice Stevens, would require no warrant if investigators entered the premises within a reasonable period of time after extinguishment of the fire, and because notice, as required by Justice Stevens, would have been futile in the circumstances of this case. Initially, we note that, while that may be a reasonable

> prediction of the outcome should the present Supreme Court hear this case, that is not the state of the law as announced in Tyler and Clifford.... 146 Mich App at 315.

Petitioner submits that the Court of Appeals was mistaken in its construction of Clifford, and that the opinion, properly read, supports the view Petitioner seeks to maintain (see also 3 LaFave, Search and Seizure, sec. 10.4, p.147, Annual Supplement: "...it now appears that a majority of the Supreme Court is of the view that no warrant is required for a with-notice post-fire inspection into the cause of a fire").

In Clifford the investigators arrived six hours after the flames had been extinguished. They then waited for an insurance crew to finish

pumping water out of the basement before making their investigative entry. A divided United States Supreme Court held the search unconstitutional, splitting 4 - 1 - 4 on the resolution of the issue. Four justices, the Powell opinion, held fast to the view that all investigative entries at any time removed from the dousing of the flames require an administrative warrant, and declined to read the entry involved as a continuation of the firefighters entry. One justice, Justice Stevens, adhered to his view that the Fourth Amendment does not allow such a creature as an administrative warrant, but held the entry unconstitutional because there was no showing that notice had been given, or that it would have been futile to attempt to

give notice (the neighbor next door knew where the occupants/respondents were, and had been in contact with them). Four justices, the Rehnquist opinion, held that a fire investigation is a class of search unto itself, which reqires no administrative warrant. Further, on the facts of the case, these justices felt notice unnecessary. Five justices, a majority of the Court, have thus held that a fire investigation may occur within a reasonable time after the flames have been extinguished without warrant, with one of the five demanding notice, an attempt to give notice, or a showing that any attempt would have been futile (See 104 S Ct at 652, 653, where Justice Stevens dwells on the possibility that the neighbor in that

case could have been employed as a method whereby to give notice). Thus, the search here was constitutional under the expressed views of a majority of the Supreme Court, and would not be violative of the Fourth Amendment, if it occurred within a reasonable time after the flames were extinguished, and if notice was given, or an attempt to give notice would have been unavailing. Under this test, the entry here was constitutional.

There can be no question that the investigation occurred within a reasonable time; indeed, it was extraordinarily expeditious, occurring within one hour and twenty minutes of the departure of the firefighters. Given that Justice Stevens had no

difficulty with the six hour time lag in Clifford, it is plain that at least five justices would have no difficulty with the much shorter interval which occurred in this case.

The factual distinctions between this case and Clifford in terms of notice compel a different result from Clifford. In Clifford Justice Stevens noted that:

> ...an argument may be made that the notice requirement is inapplicable because the owners were out of town. But no attempt whatever was made to provide them with notice, or even to prove that it would have been futile to do so. The record does not foreclose the possibility that an effort to advise them, possibly through the same party that notified the representatives of the insurance company to board up the building, might well have resulted in a request that a friend or neighbor be present

> in the house while the search was carried out...104 S Ct at 653.

Here, rather than a neighbor providing a possible method of contact of the owner/occupant, the neighbor provides the evidence that no attempt to give notice would have been availing. Mr. Tolliver testified that he saw respondent, his wife, his children, and another man drive away "fast" from the house just prior to the windows blowing out with flame. This testimony provides a basis for believing that respondent did not wish to be contacted; further, unlike Clifford, the neighbor had not been in touch with respondent prior to the investigation, and insurance men were not on the scene. There was simply no way possible for the investigators to have even a clue as to how to notify

respondent of the entry which was about to occur. Moreover, Mr. Tolliver testified that during the investigation he observed respondent pull up in his car, stop, and then drive off on two occasions. He did not stop and enter the premises until the investigators had left. Plainly respondent would not have been available for notice, as he was driving from place to place in his auto; just as plainly, he did not wish to be found or contacted at this time. Unlike Clifford, then, this record does establish that "it would have been futile" to attempt to give notice, if indeed the investigators had any possible method of knowing where to find respondent to give him notice. The statement of the Court of Appeals that this conduct somehow

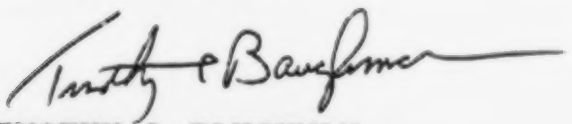
belies that an attempt to give notice would have been futile is simply not a reasonable assessment based on the facts. Five justices would thus uphold this search, and it is thus constitutional under the Fourth Amendment.

CONCLUSION

WHEREFORE, Petitioner concludes that this Court should grant plenary review, reverse the Michigan Court of Appeals, hold that the initial warrantless entry was constitutional, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



TIMOTHY A BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

APPENDIX

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,
No. 78963

v

YOUNIS MANSI ESSA,

Defendant-Appellee.

BEFORE. J. H. Gillis P. J., and H. Hood and R. Max Daniels*, JJ.
PER CURIAM

Plaintiff appeals by leave granted from an order of the trial court granting defendant's motion to suppress certain physical evidence on the ground that it was the product of an unlawful search.

The house of defendant and family at 8858 Rathbone, Detroit, burst into flames at about 6:20 p.m., November 27, 1983. The fire department responded within minutes and put out the fire in a few minutes. Firemen alerted the arson investigators of possible arson, and left the premises. About 1-1/2 hours after

the firemen left, an arson investigation officer, Lt. William Peck, entered the house without a warrant and conducted a search. The next day, Lt. Peck returned when defendant and his wife were present. He advised defendant of his Miranda[1] rights and requested permission to search the premises. Defendant signed a consent form and consented to a search. Peck did not inform defendant that he had searched the house the previous evening.

Defendant was charged with arson. At the preliminary examination, during testimony by Lt. Peck, defendant moved to suppress the results of the first search by Peck. The district court judge granted the motion. After further testimony from Peck, the district court judge found that the second search was derivative from the first illegal search, suppressed the results of that search,

and dismissed the complaint and warrant.

The people appealed, and the Recorder's Court judge affirmed, reasoning that "the second search conducted with the consent of defendant, such consent made without knowledge or notice of a prior illegal search on the part of the arson investigator, was no more than an exploitation of prior unlawful conduct on the part of the government."

We agree that fruits of the initial entry must be suppressed, but hold that the evidence gathered in the second search, pursuant to defendant's consent, was not a fruit of the initial illegal search.

In Michigan v Tyler, 436 US 499; 98 S Ct 19422; 56 L Ed 2d 486 (1978), the United States Supreme Court held that fire officials need no warrant to remain

in a building for a reasonable time to investigate the cause of a blaze in the building after the fire has been extinguished, and since the warrantless entry of firemen to put out the fire and to determine its cause is consitutional under the Fourth Amendment, the warrantless seizure of evidence while inspecting the premises for such purposes also is constitutional. The Court held that no warrant was required for the re-entry of fire officials, at 8 and 9 a.m., shortly after daylight, into a building that had been the scene of a fire earlier in the morning. Those re-entries occurred after the officials ended their initial entry for investigatory purposes at 4 a.m. because their visibility was severely hindered by darkness, steam, and smoke. Under such circumstances, the Court held that the

re-entries were no more than an actual continuation of the first entry, and the lack of a warrant during those re-entries did not invalidate the seizure of evidence resulting from such re-entries.

In Michigan v Clifford, ___ US __; 104 S Ct 641; 78 L Ed 2d 477 (1984), a 4-1-4 decision of the Court, five justices agreed that when fire investigators conducted a warrantless search of a home after the fire was extinguished and after the original firemen had left the premises, they violated the homeowner's rights under the Fourth Amendments. Justice Stevens concurred, stating that Tyler required such a result, but reiterated his opinion as stated in Tyler, supra, 56 L Ed 2d at 500-501, that absent probable cause that a crime had been committed, which would require a warrant, the Fourth Amendment

neither required nor sanctioned a warrant for forcible, non-consensual entry, but rather required reasonable advance notice to the homeowner of the entry to meet the Fourth Amendment's "reasonableness" requirement.

Plaintiff would have us hold that the initial, warrantless, nonconsensual search in the instant case was reasonable because five justices in Clifford, including Justice Stevens, would require no warrant if investigators entered the premises wihin a reasonable period of time after extinguishment, and because notice, as required by Justice Stevens, would have been futile in the circumstances of this case. Initially, we note that while that may be a prediction of the outcome should the present Supreme Court hear this case, that is not the state of the law as

announced in Tyler and Clifford, supra. Secondly, that the notice requirement may be disposed of when it would be futile to give notice is not the test proposed by Justice Stevens. The test proposed by Justice Stevens is as follows: "[A] nonexigent, forceful, warrantless entry cannot be reasonable unless the investigator has made some effort to give the owner sufficient notice to be present while the investigation is made." "Clifford, supra, 78 L Ed 2d at 491. He concluded by writing that "the search in this case was unreasonable in contravention of the fourth amendment because the investigators made no effort to provide fair notice of the inspection to the owners of the premises." Id. As in Clifford, the investigators herein made no effort to provide defendant with fair notice of the inspection of the

premises. Additionally, we note that it is not at all clear that such efforts would have been futile. Testimony by a neighbor of defendant at the preliminary examination revealed that while the fire investigators were in the house defendant drove up, sat in the auto for a few seconds, and then drove off. This occurred a second time. On a third occasion, after the investigators had left, defendant and his wife got out of the car and looked in the house for a moment, and then left.

Although we agree with the trial court that the initial warrantless entry was unreasonable, we cannot agree that the evidence seized the following day, following defendant's consent to the search, must be excluded as fruits of the poisonous tree.

We acknowledge that the "fruit of the poisonous tree" doctrine, explained at length in Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), serves to exclude as evidence not only the direct products but also the indirect products of Fourth Amendment violations. The proper question is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, supra, 488; 83 S Ct at 417; 9 L Ed 2dd at 455, quoting from Maguire, Evidence of Guilt (1959); p 221.

When it has been established that there was an illegal seizure, the state

"has the ultimate burden of persuasion to show that its evidence is untainted, *** [b]ut at the same time [the defendant] *** must go forward with specific evidence demonstrating taint." Alderman v United States, 394 US 165; 89 S Ct 961; 22 L Ed 2d 176 (1969).

Consent by a defendant, if "sufficiently an act of free will" to purge the primary taint of the unlawful search or seizure, may produce the requisite degree of attenuation. Wong Sun, supra, 371 US at 486; 83 S Ct at 416; 9 L Ed 2d at 454.

Defendant does not claim that his actions were the result of psychological coercion or anything other than an intervening act of free will on his part. Had defendant's consent been pursuant to Peck's revelation of evidence gathered

the previous evening, our holding might be different. However, we cannot agree with the lower court's determination that Peck's failure to inform defendant of the search the previous evening tainted defendant's consent. See, e.g., Schneckloth v Bustamonte, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Because defendant makes no claim that his consent was not voluntary, the fact that Peck may not have requested the consent had he not made the search the previous evening likewise does not taint the evidence obtained pursuant to defendant's consent.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ Harold Hood

/s/ R. Max Daniels

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[1]Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 264 (1965).

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 26th day of February in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice

7.7503 & (28)

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH
PATRICIA J. BOYLE
DOROTHY COMSTICK RILEY,
DENNIS W. ARCHER,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
Cross-Appellee,

SC: 77503
COA: 78963
LC: 184-0054
DC: 83-74223

YOUNIS MANSI ESSA,

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

The application for leave to appeal as cross-appellant is also considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

Williams, C.J., not participating.

STATE OF MICHIGAN - ss.

I. CORBIN R. DAVIS, Clerk of the

Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing,

this 26th day of February in the year of our Lord one thousand nine hundred and eighty-six.

_____Clerk.